

BEFORE THE

AUG 1 1994

**Federal Communications Commission**

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

Billed Party Preference  
for 0+ InterLATA Calls

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CC Docket No. 92-77

COMMENTS OF NATIONAL TELE-SAV, INC.

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## SUMMARY

National Tele-Sav, Inc. ("NTI") has monitored this proceeding since its initiation, and filed comments with the Commission back in 1992. NTI urges the Commission to terminate the proceeding, and in lieu thereof, to take steps aimed at leveling the playing field between small OSPs such as NTI and dominant carriers such as AT&T and the LECs.

According to the Commission's own estimates, the costs of implementing BPP would be staggering. However, common sense and experience indicate that the actual costs of implementing BPP probably would be much higher. Because these staggering costs will have to be borne by consumers, and because consumers already have other means by which to quickly and easily access OSPs of their choice, the Commission should terminate this proceeding.

Aside from the costs, Congress and the Commission already have taken action that has eliminated most of the problems commonly associated with the operator services industry. For instance, through the use of access codes, callers already have the ability to reach their preferred OSPs easily, at any time, and from any location. Therefore, because the ability to avoid using a particular OSP is one of the primary benefits of implementing BPP according to the Commission, BPP is unnecessary.

Moreover, implementation of BPP, by eliminating the incentive for call aggregators to enter into presubscription agreements with OSPs, would drive many small OSPs out of business. This would adversely effect the now vibrant OSP industry, eliminate thousands of newly created jobs, and create an oligopoly in which only the three or four largest OSPs are likely to remain economically viable.

Implementation of BPP would also frustrate and confuse callers. The Commission itself indicates that BPP must be available on a uniform, nationwide basis or it will cause tremendous confusion for callers. However, it is unlikely that BPP will be available on anything close to a uniform, nationwide basis because the Commission lacks jurisdiction under the Communications Act to mandate implementation of BPP for intrastate operator-assisted calls.

As if the foregoing did not provide ample reasons for not mandating implementation of BPP, the Commission should also consider that BPP, if implemented, probably would violate the Fifth Amendment's Takings Clause and the Administrative Procedures Act. BPP, by eliminating the incentive for OSPs to enter into presubscription agreements with call aggregators, would render the telecommunications equipment of call aggregators virtually worthless and, absent just compensation, likely violate the constitutional prohibition against "taking" property without just compensation. Moreover, because the costs of implementing BPP would be enormous and clearly outweigh any benefits, mandating implementation of BPP would be inconsistent with the

evidence before the Commission and constitute an "arbitrary and capricious" decision in violation of the APA.

In light of the foregoing, NTI urges the Commission, in lieu of mandating implementation of BPP, to take the following steps to lower the operating costs of small OSPs and enable them to lower their rates. For example, many small OSPs face discrimination in LEC pricing of billing and collection services. One small OSP estimates that the method of billing and collection used by most LECs costs approximately \$.29 less for each call billed and collected than the method does for it to have calls billed and collected pursuant to individually negotiated billing and collection agreements. Therefore, NTI urges the Commission to require all LECs to provide all OSPs with nondiscriminatory billing and collection services.

Finally, NTI urges the Commission to restrict use of AT&T's CIID card to access code calling, or in the alternative, to require that AT&T provide NTI and other OSPs with nondiscriminatory access to the validation information necessary to complete calls made using CIID cards. Because AT&T will not provide NTI with the validation information needed to complete calls made using the CIID card, NTI must provide dialing instructions and otherwise assist callers, at substantial cost to itself, that wish to access AT&T's network. These costs must be absorbed by NTI or passed on to its customers.

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## COMMENTS OF NATIONAL TELE-SAV, INC.

National Tele-Sav, Inc. ("NTI"), by its undersigned attorneys, submits these comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") adopted by the Federal Communications Commission ("Commission") on May 19, 1994 in the above-captioned proceeding.<sup>1/</sup>

### I. INTRODUCTION

1. NTI is a small interexchange carrier ("IXC") that is engaged primarily in the provision of telecommunications services, including operator services, in Myrtle Beach, South Carolina and the neighboring coastal resorts. Almost all of NTI's traffic originates from hotels and motels.

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<sup>1/</sup> FCC 94-117 (released June 6, 1994). Subsequent to release of the FNPRM, the Commission extended the deadline for filing comments on the FNPRM from July 8, 1994 to August 1, 1994. Billed Party Preference for 0+ InterLATA Calls, DA 94-703 (released June 24, 1994).

2. NTI has been monitoring the instant proceeding closely since its initiation two years ago, and filed comments with the Commission during an earlier stage of the proceeding.<sup>2/</sup> Like almost all other operator service providers ("OSPs") across the country, NTI is extremely concerned about the Commission's proposal to implement a billed party preference ("BPP") system.<sup>3/</sup> Despite the Commission's tentative conclusion that implementation of BPP would be in the public interest - based in large part on the Commission's finding that the benefits of implementing BPP would outweigh the costs<sup>4/</sup> - the record in this proceeding is replete with evidence that the costs of implementing BPP are enormous and greatly exceed the illusory benefits identified by the Commission. In fact, despite the Commission's tentative conclusion to mandate implementation of BPP, NTI, as will be explained in more detail below, urges the Commission to terminate this proceeding as quickly as possible, and in lieu thereof, take a number of other steps which, unlike BPP, would help to level the playing field between small OSPs such as NTI and dominant carriers such as the American Telephone and Telegraph Company ("AT&T") and local exchange carriers ("LECs").

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<sup>2/</sup> Comments of National Tele-Sav, Inc. (dated December 14, 1992).

<sup>3/</sup> As envisioned by the Commission, BPP would enable all "0+" calls to be routed to an OSP preselected by the party paying for the call rather than to the OSP chosen by the owner of the telephone from which the call is placed. FNPRM at ¶ 5.

<sup>4/</sup> FNPRM at ¶ 37.

## II. DISCUSSION

### A. THE COMMISSION SHOULD TERMINATE THE INSTANT PROCEEDING AS SOON AS POSSIBLE

3. According to the Commission's own estimates in the FNPRM, the costs of implementing BPP would be staggering. These estimated costs include approximately \$1.1 billion in nonrecurring charges and \$60 million in annual recurring expenses which would be incurred by LECs,<sup>5/</sup> and \$120 million in nonrecurring charges which would be incurred by OSPs.<sup>6/</sup> In addition, the Commission itself implies that the actual cost of implementing BPP would be significantly higher because its cost estimates do not include the overhead loading costs many LECs would incur.<sup>7/</sup>

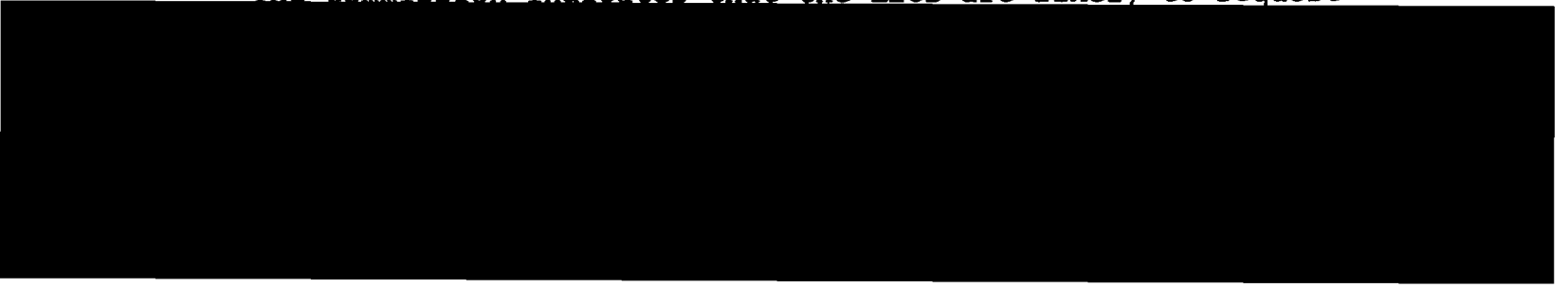
4. Even though these cost estimates are staggering, the actual cost of implementing BPP probably would be significantly higher than the Commission estimates. For one thing, common experience indicates that the costs of completing extremely large projects are usually much higher than initially predicted. Moreover, as the Commission itself notes in the FNPRM, the cost estimates for implementing BPP are imprecise because, among other things, some of the software necessary to implement BPP has yet

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<sup>5/</sup> FNPRM at ¶ 27.

<sup>6/</sup> FNPRM at ¶ 28.

<sup>7/</sup> The Commission indicates that the LECs are likely to request



to be developed and it is not known whether the discounts usually provided LECs on telecommunications equipment will be available in this situation.<sup>8/</sup> As such, because of the enormous and ill-defined nature of the Commission's cost estimates, the Commission's tentative conclusion to proceed with implementation of BPP is difficult to understand.

5. The Commission's tentative conclusion to proceed with implementation is made even more difficult to understand by virtue of the fact that BPP, especially in light of its staggering costs, is totally unnecessary. In recent years, Congress and the Commission have both taken actions that, according to the Commission's own findings, have eliminated most of the problems which BPP is intended to rectify. For instance, the Commission adopted rules in 1991 that required OSPs to provide "950" or "800" access codes for their customers to reach them and required call aggregators to unblock all carrier access codes.<sup>9/</sup> Moreover, prepaid telephone calling cards, sometimes referred to as debit cards, have become an increasingly popular way for callers to access their preferred OSPs.<sup>10/</sup> Therefore, because one of the primary benefits to implementing BPP identified by the Commission would be the ability of callers to

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<sup>8/</sup> FNPRM at ¶ 20.

<sup>9/</sup> Policies and Rules Concerning Operator Services Access and Pay Telephone Compensation, 6 FCC Rcd 4736 (1991).

<sup>10/</sup> New York Times, May 28, 1994 at § 1, p. 1, col. 2.



avoid using a particular OSP if they so choose, and because access codes and debit cards already provide callers with a quick and easy way of accessing their preferred OSPs at any time and from any location, implementation of BPP is totally unnecessary.

6. In addition, implementation of BPP, by eliminating the incentive for call aggregators to enter into presubscription agreements with OSPs, would drive many small OSPs out of business because, unlike AT&T, MCI Communications Corporation ("MCI"), and Sprint Corporation ("Sprint"), these OSPs do not have a preexisting base of "1+" customers that are likely to presubscribe to their "0+" services. For this reason, all but three or four of the largest carriers are likely to be squeezed out of the OSP market. Thousands of newly created jobs also would be eliminated.<sup>11/</sup> Indeed, the jobs of the approximately 35 people employed by NTI likely would disappear. Consequently, implementation of BPP would undermine the long-term viability of a competitive OSP market, irreparably harm the larger telecommunications industry by depriving it of many emerging and innovative carriers, and injure the nation's economy by eliminating thousands of jobs and an untold number of emerging telecommunications companies.

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<sup>11/</sup> This would not comport with recent Commission decisions which are replete with references to the positive effect its decisions will have on the creation and preservation of jobs. See Commission Adopts Competitive Bidding Procedures for Broadband PCS, Report No. DC 2621 (released June 29, 1994).

7. While the Commission proposes to help small OSPs remain viable by allowing callers to choose both a preferred and secondary OSPs,<sup>12/</sup> it is highly unlikely that callers will choose to deal with multiple OSPs when a single large OSP, such as AT&T, MCI, or Sprint, can satisfy all of their operator service requirements by providing nationwide coverage. Also, it is highly unlikely that OSPs will willingly enter into equitable arrangements with their competitors to serve as secondary carriers. Common sense indicates that, unless the Commission requires OSPs to exchange traffic and closely monitors the terms and conditions of such traffic exchange, OSPs will almost certainly not enter into primary/secondary carrier arrangements with their direct competitors. For this reason, the Commission's proposal to allow primary/secondary carrier arrangements is unlikely to help small OSPs remain viable in the event BPP is implemented.

8. Moreover, implementation of BPP, now that callers finally have become accustomed to using access codes and other means of dialing around a presubscribed OSP, would serve to frustrate and confuse callers. Aside from the waste of resources already expended on installing new equipment to establish access codes and educating callers on how to use them, implementation of BPP at this late date would confuse and frustrate callers by adding another layer of complexity to the operator services

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<sup>12/</sup> FNPRM at ¶¶ 68 and 69.

industry. Moreover, the Commission itself indicates that BPP must be available on a uniform, nationwide basis or it will cause tremendous confusion for callers.<sup>13/</sup> However, it is unlikely BPP would be available on anything close to a uniform, nationwide basis because the Commission lacks jurisdiction under the Communications Act of 1934 ("Act") to mandate implementation of BPP for intrastate operator-assisted calls.<sup>14/</sup> As such, because the vast majority of operator-assisted calls are intrastate in nature, BPP, if implemented, only would be available, at most, on a sporadic basis throughout the nation, and callers, to their confusion and frustration, would never know where and when it is available.

9. As if the foregoing does not provide ample reasons for not implementing BPP, the Commission should also consider that BPP, if implemented, would probably violate the Fifth Amendment's Takings Clause.<sup>15/</sup> BPP, by eliminating the incentive for OSPs to enter into presubscription agreements with call aggregators,

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<sup>13/</sup> In this regard, the Commission notes that "different dialing schemes for different locations would confuse callers, and undermine the benefits of simplified operator service calling." FNPRM at ¶ 49.

<sup>14/</sup> While Section 2(a) of the Act provides the Commission with jurisdiction over matters involving interstate and foreign communications, Section 2(b) of the Act reserves to the states jurisdiction over intrastate communications. 47 U.S.C. § 152 (a) and (b) (1994).

<sup>15/</sup> The Fifth Amendment to the United States Constitution prohibits the federal government from taking "private property ... for public use, without just compensation." U.S. Const. amend. V.

would render the telecommunications equipment of call aggregators virtually worthless and, absent just compensation, probably violate the Takings Clause.<sup>16/</sup>

10. Relatedly, because the costs of implementing BPP would be enormous and clearly outweigh the benefits identified by the Commission, mandating implementation of BPP would constitute an "arbitrary and capricious" decision in violation of Section 553 of the Administrative Procedures Act ("APA").<sup>17/</sup> In this regard, while administrative agencies are given wide latitude in rulemaking proceedings, they cannot take actions which "run counter to the evidence before the agency."<sup>18/</sup> Accordingly, because the costs of implementing BPP would be staggering, and because of the ready availability of other means to meet the Commission's goals in this proceeding, implementation of BPP would run counter to the evidence before the Commission and therefore violate Section 553 of the APA.

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<sup>16/</sup> The courts have ruled that an unconstitutional "taking" has occurred in situations where government agencies interfere with investment-backed expectations. See Loretto v. Teleprompter Manhattan CATV Corp., 102 S.Ct. 3164 (1982).

<sup>17/</sup> 5 U.S.C. § 553 (1994).

<sup>18/</sup> Motor Vehicle Mfrs. Ass'n v. State Farm Auto Ins. Co., 103 S.Ct. 2856, 2866 (1983).

**B. THE COMMISSION SHOULD TAKE ACTION TO LEVEL THE PLAYING FIELD BETWEEN SMALL OPERATOR SERVICE PROVIDERS AND DOMINANT CARRIERS SUCH AS AT&T**

11. In light of the foregoing, NTI urges the Commission to terminate the instant proceeding as quickly as possible, and in lieu thereof, take a number steps aimed at leveling the playing field between small OSPs and dominant carriers. Specifically, because one of the primary factors driving this proceeding apparently is the Commission's perception that many OSPs are charging higher rates than those charged by AT&T, NTI urges the Commission to eliminate certain anticompetitive regulations and business practices favoring dominant carriers, and in this way, help to lower the operating costs, and hence the rates, of small OSPs such as NTI. For example, many small OSPs face discrimination in the pricing of billing and collection services by LECs that provide such services. In this regard, one small OSP estimates that the method of billing and collection used by most LECs costs approximately \$.29 less for each call billed and collected than it does for it to have calls billed and collected pursuant to individually negotiated billing and collection agreements.<sup>19/</sup> Therefore, NTI urges the Commission to require

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<sup>19/</sup> See Fidelity Tel. Co. v. Southwestern Bell Tele. Co., Reply Brief of Fidelity Telephone Company in Opposition to Post-Hearing Brief of Southwestern Bell Telephone Company and Bell Communications Research, Inc., File No. 92-4326-CV-W-8 at 49 and 50 (W.D. Mo. 1992).

all LECs to provide all OSPs with nondiscriminatory billing and collection services.

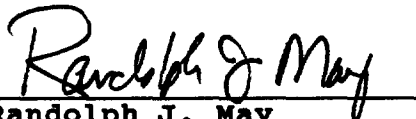
12. Also, NTI urges the Commission to restrict use of AT&T's Card Issuer Identifier ("CIID") cards to access code calling, or in the alternative, to require that AT&T provide NTI and other OSPs with nondiscriminatory access to the validation information necessary to complete calls made using CIID cards. NTI receives many calls every day from callers using AT&T's CIID cards. However, because AT&T will not provide NTI and other OSPs with the validation information needed to complete calls made using CIID cards, NTI must incur significant costs in providing dialing instructions and otherwise assisting callers that wish to access AT&T's network. Provision of this assistance, which NTI must provide or incur substantial caller and call aggregator anger, imposes enormous costs on NTI which must be absorbed or passed on to its customers in the form of higher rates. Amelioration of this problem, not by implementing BPP but by addressing these competitive issues, will enable the Commission to achieve its goal of lowering OSP rates without driving many OSPs out of business.

**III. CONCLUSION**

13. In light of the foregoing, National Tele-Sav, Inc. urges the Federal Communications Commission to take action in accordance with the views expressed herein.

**Respectfully submitted,**

**NATIONAL TELE-SAV, INC.**

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**August 1, 1994**

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CERTIFICATE OF SERVICE

I, Teresa A. Pumphrey, hereby certify that a copy of the foregoing Comments of National Tele-Sav, Inc. has been served by hand this 1st day of August 1994 on the following:

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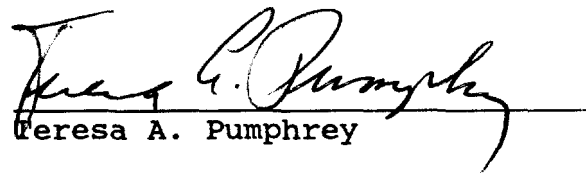
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